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VIA EMAIL
rhealer@usbr.gov

Ms. Rain Healer
South Central California Area Office
U.S. Bureau of Reclamation
1243 N St
Fresno, CA 93721

Re: Comments on San Luis Interim Contract Renewal Draft EA/FONSI

Dear Ms. Healer:

On behalf of North Coast Rivers Alliance, we respectfully submit the following comments on the San Luis Interim Contract Renewal Draft Environmental Assessment ("EA") and Draft Finding of No Significant Impact ("FONSI"). We believe the EA and FONSI to be deficient and request that an Environmental Impact Statement be prepared, as required by the National Environmental Policy Act ("NEPA"), for the following reasons:

1. The Purpose and Need for the San Luis Interim Contract Renewal ("Project") is unclear. The EA does not explain why it has become necessary in some cases to execute *eleven or twelve* "interim" contracts. Nor does the EA estimate when a long-term contract will be executed.

2. The alternatives analysis is inadequate. The No Action Alternative was based on a misinterpretation of the Central Valley Project Improvement Act ("CVPIA"), and should have considered non-renewal of the contracts, in accordance with the expressly discretionary terms of the CVPIA. Moreover, alternatives proposing a reduced quantity of water deliveries were improperly eliminated from further consideration. Overall, the EA compares the environmental effects of two virtually identical actions, making a mockery of NEPA's informational purpose.

3. The study area is unduly narrow, restricting consideration of the Project's impacts, and the EA does not explain why this choice was made.

4. The EA fails to adequately assess the impacts of renewing the contracts. Specifically, the discussion of water and biological resource impacts ignores that contract renewal will foreseeably lead to groundwater pollution and harm to plants and animals.

5. The cumulative impact assessment has no analysis whatsoever. This is particularly egregious because many of the EA's findings of no significant impact are predicated on the idea that there will be no impact due to the brief length of the "short interim period." But most of the contracts are on their twelfth renewal, and the EA makes no attempt to ascertain the long-term environmental impacts that may result from an extended series of "short interim period[s]."

6. This Draft EA, by its own terms, is not yet final. "This draft EA will not be finalized until the Section 7 consultation [with USFWS] is complete," (EA, p.26) but consultation is ongoing. Therefore, a Supplemental EA will have to be prepared when consultation is complete, in order to allow public comment on the entire document.

Thank you for considering our comments on this important matter.

Very truly yours,

/s/ Stephan C. Volker

Stephan C. Volker
Attorney for North Coast Rivers Alliance

Attachment: Detailed comments

DETAILED COMMENTS

1. The Purpose of and Need for this Project Is Unclear.

The Purpose and Need section provides scant information about why this particular Project is actually needed. It explains why water is needed in the Central Valley, but not why it must be delivered pursuant to *these* "interim" contracts. Most of the contracts proposed to be renewed "are currently in their eleventh interim renewal contract and the proposed renewal would be the twelfth." EA, p. 6. Because each renewal is for two years (except for an initial 3-year interim renewal), this means that *six of the eleven contracts have already been renewed for an "interim" period of 23 years!* The EA does not explain why such a lengthy interim period has become necessary. Nor does it estimate when a long-term renewal will occur. The EA obfuscates the justifications for the Project by failing to discuss why "interim" renewals are required. Accordingly, it fails to satisfy NEPA.

2. The Alternatives Discussion is Woefully Inadequate.

A. The EA misinterprets the Bureau's authority under the CVPIA and accordingly improperly assumes that the contracts will be renewed, even under the No Action Alternative.

The EA's *No Action* Alternative improperly assumes that the Bureau of Reclamation ("Bureau") *will* take an action – renewing the interim contracts. The stated reason is that "[n]on-renewal of existing contracts is considered infeasible" because "Reclamation has no discretion not to renew existing water service contracts" under section 3404(c) of the CVPIA. EA, at 9. This is a misreading of the Bureau's authority under the CVPIA, which expressly permits the Bureau *not* to execute an *interim* contract.[1] Accordingly, the EA should have considered non-

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[1]Section 3404(c) of the CVPIA reads, in pertinent part, as follows:

(c) Renewal of Existing Long-Term Contracts.--Notwithstanding the provisions of the Act of July 2, 1956 (70 Stat. 483), *the Secretary shall, upon request, renew any existing long-term* repayment or *water service contract* for the delivery of water from the Central Valley Project *for a period of 25 years and may renew such contracts for successive periods of up to 25 years* each.

(1) No such renewals shall be authorized until appropriate environmental review, including the preparation of the environmental impact statement required in section 3409 of this title, has been completed. *Contracts which expire prior to the*

renewal of the contracts as the No-Action alternative, in order to provide the Bureau with information about the environmental consequences of exercising the discretion expressly granted to it.

The EA relies upon the first set of italicized language (*supra* n. 1) for the proposition that "the Secretary **shall** . . . renew any existing long-term . . . contract" and therefore it has no discretion not to execute an interim renewal of the contracts. EA, p. 9 (emphasis in original). But this is not the relevant language. The pertinent part of section 3404(c) is in subsection (1), which says that "[c]ontracts which expire . . . **may** be renewed for an interim period. . . ." (Emphasis added.) Congress clearly knew the difference between the mandatory shall and the permissive may, as reflected by the fact that the statute says that the Secretary "shall" execute a first long-term renewal, but only "may" execute "successive" long-term renewals. Because the statute only says that the Bureau "may" issue interim renewals of expired contracts, *the Bureau has discretion not to renew the contracts*. Therefore, the No Action Alternative should have considered the environmental impacts of not renewing the contracts, and its failure to do so violates NEPA.

Furthermore, even assuming contrary to law that the CVPIA did *not* give the Bureau discretion not to renew the contracts, this would not be a sufficient reason to dismiss non-renewal as an alternative. NEPA is intended to "inform [all] three branches of government." *Rhode Island Committee on Energy v. Gen. Svcs. Admin.,* 397 F.Supp. 2d 41, 56 n.19 (D.C.R.I. 1975). Accordingly, "even if an alternative requires 'legislative action', this fact 'does not automatically justify excluding it from an EIS.'" *Methow Valley Citizens Council v. Regional Forester,* 833 F.2d 810, 815 (9th Cir. 1987) (quoting *City of Angoon v. Hodel,* 803 F.2d 1016, 1021 (9th Cir. 1986)).[2] Even if the Bureau *were* required to renew the contracts, analyzing the impact of not

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> *completion of the environmental impact statement required by section 3409 may be renewed for an interim period not to exceed three years in length, and for successive interim periods of not more than two years in length,* until the environmental impact statement required by section 3409 has been finally completed, at which time such interim renewal contracts shall be eligible for long-term renewal as provided above. . . .

(Emphasis added.)

[2]*Methow Valley* was "reversed only in part" by the Supreme Court at 490 U.S. 332. *Methow Valley Citizens Council v. Regional Forester,* 879 F.2d 705, 706 (9th Cir. 1989). "The Supreme Court . . . did not address the portion of the Ninth Circuit decision dealing with alternatives; thus, that aspect of the Circuit court's decision remains good law." Remy, *et al.,*

renewing them would help inform Congress about the environmental consequences of the CVPIA. For both of these reasons, the No Impact Alternative should have been *non-renewal* of the contracts.

B. The EA fails to consider a reasonable range of alternatives.

"[C]ourts require consideration of a reasonable range of alternatives in environmental assessments as well as in impact statements." Mandelker, *NEPA Law and Litigation,* § 10:30. The EA fails to consider a reasonable range of alternatives. In fact, the only alternative considered was the No Action Alternative, and the only difference between the alternative and the Proposed Action is that the No Action Alternative includes "tiered pricing," which the EA repeatedly states would not make any difference as to the Project's impacts. *E.g.,* EA, pp. 21, 25, 32. Essentially, no alternatives at all were considered. A proper range of alternatives would have considered a reduction in contract water deliveries, particularly since more water is promised under the contract than has been delivered recently. *See* EA, p. 14. Considering the impacts of a reduced-delivery alternative would allow the EA to give a more realistic estimate of the environmental impacts of *using* all of the water entitled under the current contracts. In other words, the EA's failure to consider the environmental impacts of *using* the amount of water *entitled* vis-a-vis the amount of water *actually delivered* prevents the EA from providing a realistic assessment of the Project's actual impacts. A proper range of alternatives would have included both options. The EA's improperly limited range of alternatives fails to satisfy NEPA.

3. The Study Area is Unduly Narrow

The EA's consideration of environmental impacts is limited solely to the service areas of the San Luis Unit contractors. EA, p. 11. That is to say, the EA does not consider the environmental impacts of water deliveries on the water *sources* – such as the American, Trinity, and Sacramento Rivers, and the Delta – all of which are outside of the Study Area. It also fails to analyze the impacts of the Project on the Santa Rosa Rancheria, solely because the Rancheria is located six miles east of the Study Area. EA, p. 36. By narrowly defining the study area, the EA unlawfully fails to disclose all of the Project's impacts, some of which will occur outside of the Study Area. This PEIS from which this EA was tiered "did not analyze site specific impacts of contract renewal." EA, p. 2. As such, the Study Area must be expanded so as to encompass all areas potentially affected by the Project's site specific impacts, including source areas. A failure to do so would violate NEPA.

Guide to CEQA, p. 1028 n. 78 (11th ed. 2007).

Furthermore, no explanation is given regarding the Study Area's boundaries. Please also provide an explanation as to why the Study Area's boundaries were drawn in this limited fashion.

4. The EA's Analysis of Water and Biological Resources Impacts is Deficient.

NEPA requires agencies to take a "hard look" at the potential environmental consequences of their actions. *Kern v. U.S. Bureau of Land Management,* 284 F.3d 1062, 1066 (9th Cir. 2002). Thus, "mere[] . . . asserti[ons] that an activity . . . will have an insignificant effect" do not satisfy NEPA; instead, agencies must "supply a *convincing statement of reasons* why potential effects are insignificant." *Alaska Center for Environment v. U.S. Forest Serv.,* 189 F.3d 851, 859 (9th Cir. 1999) (emphasis added) ("*Alaska Center*"). An EIS is required if there are "'*substantial questions* whether a project *may* have a significant effect' on the environment." *Blue Mountains Biodiversity Proj. v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir. 1998) (citation omitted; emphasis added) ("*Blue Mountains*").

"'[G]eneral statements about "possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided.'" *Blue Mountains, supra,* 161 F.3d at 1213 (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.,* 137 F.3d 1372, 1380 (9th Cir. 1998)). The EA fails to affirmatively demonstrate that the Project's impacts will be insignificant, as discussed more fully below. Therefore, the EA does not comply with NEPA, and an EIS must be prepared.

A. <u>The analysis of Water Resources impacts is inadequate.</u>

The EA fails to actually consider what effects the Project will have on already-compromised water resources. The EA acknowledges, under the heading "Impacts of Agriculture on Groundwater," that over the past 40 years, "salt and selenium concentrations in groundwater" have increased in the area, "as a result of imported irrigation water." EA, p. 20. Salt and selenium contamination is especially prevalent "[i]n low-lying areas of the valley." *Id.* Moreover, "[s]ignificant portions of the groundwater in the San Luis Unit exceed the California Regional Water Quality Control Board's recommended [total dissolved solids] concentration. Calcium, magnesium, sodium, bicarbonates, selecium, sulfates, and chlorides are all present in significant quantities as well." *Id.* The EA further acknowledges that the presence of many of these latter chemicals is the result of agricultural operations. *Id.* at 26.

Yet the entirety of the EA's discussion of whether the Project may contribute to these water quality problems is as follows: "Much of the San Luis Unit is drainage impacted, so high efficiency irrigation is [already] implemented as a mechanism for reducing deep percolation and subsurface drainage production. [¶¶] Reclamation does not anticipate that the No Action

Alternative[3] would cause any changes . . . in the quantity, quality, or discharge or drainage emanating from or within the San Luis Unit. . . ." *Id.* at 21-22. This conclusion is a "mere[]. . . asserti[on]" that has no support whatsoever. *Alaska Center,* 189 F.3d at 859. There is no estimate or discussion of how widely high efficiency irrigation is used, or how effective it is at "reducing deep percolation." Instead, the Bureau simply "does not anticipate" any changes to water quality. This does not constitute a "hard look" at the project's impacts on water quality. Because there are "substantial questions" about whether the Project – and the agricultural operations it enables – "may" have a significant effect on water resources, and because the EA cannot in any way be deemed to include "a *convincing statement of reasons* why potential" water resources "effects are insignificant," an EIS must be prepared. *Blue Mountains,* 161 F.3d at 1212; *Alaska Center,* 189 F.3d at 859.

B. The analysis of Biological Resources impacts is inadequate.

The analysis of impacts to biological resources is perfunctory at best. The EA fails to explain its conclusions in this area. For example, the EA acknowledges that an ongoing shift toward orchard crops (from row crops) means that the No Action Alternative "would adversely affect[]" "species . . . preferring row crops." EA, p. 25. But the EA inexplicably concludes that "over the short interim period, these changes are not likely to be substantial." *Id.* The EA contains no attempt to quantify or otherwise assess the actual impacts on species preferring row crops. Again, "general statements about 'possible' effects . . . do not constitute" the required "hard look" at environmental impacts in an EA unless the agency provides an explanation as to why "more definitive information could not be provided." *Blue Mountains, supra,* 161 F.3d at 1213. Here the Bureau states that impacts are "not likely to be substantial," but it fails to explain why a more definitive statement could not have been given. Thus, an EIS must be prepared.

5. The Cumulative Impact Analysis is Stunningly Deficient.

After defining "cumulative impact," the EA proceeds with its discussion of the same, which reads, in its entirety, as follows:

> To determine whether cumulatively significant impacts are anticipated from the Proposed Action, the incremental effect of the Proposed Action was examined together with impacts from past, present, and reasonably foreseeable future actions in the same geographic area.

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[3] The discussion of the Proposed Action's impacts on water resources has no substantive assessment of water *quality* impacts.

> Renewal of 11 interim contracts would not contribute to cumulative changes or impacts to water resources, biological resources, air quality, cultural resources, ITA, land use, socioeconomic resources, environmental justice or global climate change.
>
> Therefore, there would be no cumulative impacts as a result of the Proposed Action.

EA, p. 34. This cumulative impact analysis violates NEPA for two related reasons.

First, it is simply too conclusory. There is no discussion of how the Bureau arrived at its conclusion that "[r]enewal of 11 interim contracts would not contribute to cumulative . . . impacts. . . ." *Id.* In essence, the public is being asked to take the Bureau at its word that it assessed the Project's cumulative impacts with no evidence whatsoever that it actually did so. There is no explanation for any of the cumulative impact findings. At the risk of being repetitious, "mere[] . . . asserti[ons] that an activity . . . will have an insignificant effect" do not satisfy NEPA; instead, agencies must "supply a *convincing statement of reasons* why potential effects are insignificant." *Alaska Center,* 189 F.3d at 859. The cumulative impacts discussion gives no reasons at all for its conclusions, convincing or otherwise. Thus, the EA violates NEPA.

Second, the EA's conclusions about cumulative impacts are at odds with its conclusions in other areas. The EA's repeatedly concludes that various potentially significant effects will not actually be significant due to the brief, two-year "interim" nature of the renewals. EA, pp. 21 (water resources); 25 (biological resources); 30 (land use); 32 (socioeconomic resources); 33 (environmental justice). The fact that impacts are supposedly not significant *because* of the short two-year renewal term obviously raises "substantial questions" as to whether there "may" be significant impacts over a longer period of time. *Blue Mountains,* 161 F.3d at 1212. More than half of the "interim" contracts being renewed are being renewed for the *twelfth* time. EA, p. 6. This raises the even more obvious question of whether the "incremental effects of the Proposed" two-year extension, when added to the 23 years of past renewals,[4] *may* in fact have a "cumulatively significant impact on the environment." EA, p. 34. The EA does not even attempt to address this patent inconsistency. The EA's failure to discuss cumulative impacts makes it impossible to ascertain the long-term environmental consequences of a 23-year series of interim renewals. As such, the EA fails in its informational purpose and violates NEPA.

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[4]Also relevant are potential future renewals, of which the EA makes no mention, even though further interim contracts are clearly "reasonably foreseeable" given (1) the number of past renewals and (2) the fact that the EA does not estimate when a long-term contract will be executed.

6. The EA Fails to Disclose the Mitigation Measures that Will be Imposed as a Result of Consultation with USFWS, And By its Own Terms is Not Yet Final.

The EA relies on the pending results of consultation with USFWS to ensure that the Project will not have any significant impacts. "[C]onsultation . . . ensure[s] that renewal of interim contracts would not result in any significant effect to threatened or endangered species." EA, p.26. In other words, the Bureau is using a "mitigated FONSI" to avoid environmental impacts. "A 'mitigated FONSI is upheld when the mitigation measures significantly compensate for a proposed action's adverse environmental impacts.'" *Oregon Natural Desert Ass'n v. Singleton, 47* F.Supp. 2d 1182, 1193. (D. Or. 1998) (citation omitted). "Although mitigation measures need not completely compensate for adverse environmental impacts . . . the agency must analyze mitigation measures in detail and explain how effective the measures would be." *Id.* (citation omitted). "A mere listing of mitigation measures" in an EA "is insufficient to qualify as the reasoned discussion required by NEPA. Instead, mitigation measures should be supported by analytical data. . . ." *Id.* (citation omitted).

The EA violates NEPA because it does not even include the (insufficient) "mere listing of mitigation measures." Instead it simply promises that consultation will eliminate all potential impacts without disclosing the mitigation measures that consultation will produce. In other words,

> The [Bureau's] "mitigated FONSI" is not supported by any analytical data; . . . and it does not reveal how mitigation measures would compensate for the adverse [biological] impacts identified in the . . . EA. [¶] The . . . EA . . . is replete with plans to monitor conditions and develop data in the future, but . . . NEPA requires that the agency develop the data first, and then make a decision, not make a decision and then develop the data.

Id. at 1194. Because the EA does not include the results of consultation with USFWS, it fails to demonstrate that consultation will in fact mitigate "potential effects to species and critical habitats. . ." as promised. EA, p. 35. Indeed, by its own terms, the "draft EA will not be finalized until the Section 7 consultation is complete." The Bureau's attempt to defer inclusion of mitigation measures in the EA until after the public comment period has elapsed violates NEPA. The public must be allowed to comment on the mitigation measures, so that (1) their adequacy can be assessed, and (2) impacts *from* mitigation measures can themselves be

mitigated. If the Bureau does revise the EA to include the results of consultation, a supplemental EA must be prepared, because the results of consultation would constitute both "new . . . information" and "substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c).[5]

For all of these reasons, NCRA urges the Bureau to reject the proposed EA and FONSI and to prepare an EIS.

Thank you for considering our comments on this important matter.

[5]Although "CEQ regulations for supplemental [EISs] do not apply to environmental assessments, . . . the courts apply the same requirements to supplemental [EA] claims that they apply to supplemental [EISs]." *NEPA Law and Litigation, supra,* § 10:49.